No. 84-1731

IN THE

Supreme Court of the United States

October Term, 1984

THE LORAIN JOURNAL CO.,
THE NEWS-HERALD, and
J. THEODORE DIADIUN,
Petitioners,

v.

MICHAEL MILKOVICH, SR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

MOTION OF THE OHIO NEWSPAPER ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Ohio Newspaper Association hereby respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari in this case. The consent of counsel for the petitioners has been obtained, but the Ohio Newspaper Association has been unable to obtain the consent of counsel for respondent.

The Ohio Newspaper Association (herein "ONA") is a non-profit corporation organized and existing under the laws of the State of Ohio. Its membership consists of approximately 250 daily and weekly newspapers in Ohio, representing the major proportion of the circulation of newspapers in this state.

The ONA was organized to promote the best interests of its publishers and their readers. It has appeared as *amicus curiae* representing the interests of its membership in Ohio and federal courts, including a previous appearance in this case before this Court. By design, the ONA's structure keeps it in contact with the membership on a variety of points of legal as well as operational interests. The ONA feels, therefore, that it is in a unique position to represent the concerns of the collective Ohio press in this matter.

It is from that perspective that the ONA voices its support for this Court's granting the petition for a writ of certiorari. The holding of the Ohio Supreme Court in this case that a nationally active and nationally acclaimed high school wrestling coach was neither a public figure nor a public official has left a great deal of uncertainty about what constitutes a public figure or a public official in libel actions in the State of Ohio. In addition, by holding that the article in issue did not constitute protected opinion without enumerating any legal rationale, the Ohio Supreme Court has created confusion and hesitancy regarding what constitutes opinion in Ohio.

These holdings will inevitably have a chilling effect on Ohio's newspapers' First Amendment rights of freedom of the press by creating a significant amount of self-censorship. The decision that respondent is neither a public figure nor a public official in Ohio will seriously constrain the press when reporting matters of public interest. Further, the Ohio Supreme Court's failure to enumerate what legal standards apply to determine opinion from assertions of fact strikes at the very heart of the importance of free debate in our society as pronounced by this Court over many years.

Thus, the ONA asks leave of this Court to file its *amicus curiae* brief in support of the petition for a writ of certiorari. Even while recognizing this Court's heavy case load, we nevertheless believe and respectfully represent that the uncertainty created by the decision appealed from is damaging to the public interest and, if followed, will restrain the working press in the fulfillment of its First Amendment responsibilities. Resolution of this issue will have significant consequences for the Ohio press which

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provides news and information to the general public. The ONA hopes that its desire to present the concerns of those most seriously affected will provide assistance to the Court in resolving the constitutional issues which appear in this case.

Respectfully submitted,

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Dated: June 5, 1985

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The Ohio Newspaper Association, as *amicus curiae* in support of the petition for writ of certiorari in this case, agrees with and adopts those matters presented by petitioners as required by Rule 21 of this Court to be set out in advance of argument amplifying the reasons relied on for the allowance of the writ.

SUMMARY OF ARGUMENT

1. A public high school wrestling coach and teacher with national and local prominence is a public figure under the test of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
2. Such a wrestling coach and teacher is also a public official for purposes of determining liability based upon alleged defamation in a newspaper article.
3. Absent actual malice, a newspaper article in which the author discloses the facts upon which the article is based is opinion protected by the First Amendment.

ARGUMENT IN SUPPORT OF REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The Ohio Newspaper Association ("ONA") urges this Court to grant a *writ of certiorari* in this case to correct the decision of the Ohio Supreme Court and to protect the Ohio press's ability to remain free and robust. The three key issues in determining the press's potential liability in defamation actions have each been addressed by the Ohio Supreme Court in *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1974), and each has been resolved in a way that the press must speak with such a degree of care that the decision effectively acts as a restraint. The decision appealed from holds that a nationally and locally prominent high school wrestling coach and teacher is (1) neither a public figure, (2) nor a public official, and (3) that an article concerning his involvement in a raucous wrestling match and his veracity in subsequent testimony concerning that event does not amount to protected opinion. Each of those determinations would alone be sufficient cause to prompt the attention of this Court, but all three together in one decision cries out for correction.

The facts of the case are well-known and well-documented, and there is little dispute about them. Several of them, though, have especial significance to the ONA. First, the respondent-plaintiff, Michael Milkovich, Sr., is a wrestling coach in a large Ohio high school, and his teams had consistently been among the best in Ohio's state championships. (In fact, they were seeking their eleventh consecutive state championship. *See*, Petitioner's Petition for Writ of Certiorari at A76 therein.) Second, respondent not only sought reknown in his field, but he also both traded on it by promoting his own wrestling program as "Ohio's Number One High School Coach" (R. 641) and succeeded in attaining it as his long list of awards and accomplishments demonstrates (R. 588-651). Finally, the precipitating wrestling match, the suspension of both respondent and his high school team from state tournament competition, and the subsequent (unrelated) litigation involving those events were surely matters of concern in the local sporting world and community-at-large.

Yet, the Ohio Supreme Court in *Milkovich* found respondent neither occupied a position of persuasive power or influence nor thrust himself into the forefront of a controversy to influence its decision. It is difficult to imagine, however, how a man who tried so hard and succeeded so well at becoming well-known and who testified in support of regaining his well-known team's eligibility for state championship competition can avoid being a public figure for First Amendment purposes. U.S. Const. amend. I (hereinafter "First Amendment"). That Court also concluded that respondent's purposeful self-advertising in connection with wrestling clinics did not matter in determining whether or not he was a public figure. *Milkovich*, 15 Ohio St. 3d at 297, 473 N.E.2d at 1195. One may well wonder what is required to satisfy that test when one who seeks fame and gets it is not considered a public figure in First Amendment litigation.

In finding that respondent was not a public figure, the Ohio Supreme Court found that this Court so limited its decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) that similarities between *Milkovich* and *Butts* were wholly unpersuasive. Petitioner has documented the similarities between the two, and they need not be repeated here. Surely, though, a man with so many commendations and successes as respondent, and with such self-proclaimed notoriety cannot avoid the consequence of the success and notoriety he sought and achieved.

Finding that respondent is not a public figure works a hardship on the Ohio press. Even without trying to extract general principles from the Ohio Supreme Court decision and applying them to walks of life other than high school coaching and teaching, the case imposes severe restraints on what the Ohio press can say about its public school coaches, teachers and administrators. Another court has said the following in the context of making a public official determination:

> [W]e can think of no higher community involvement touching more families and carrying more public interest than the public school system. This includes the athletic program.

Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1103 (Okla. 1978). Surely press reports concerning those who are prominently responsible for those important community events involve public figures.[1]

The ONA also believes that respondent should have been held to be a public official by the Ohio court. That court provided no real clue to its holding on this issue except to say that "the facts of the instant case are insufficient" to make respondent a public official, that the *Johnston* decision would "unduly exaggerate" this Court's decision in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), and that it was "unpersuaded" that *Rosenblatt's* definition applied to respondent. *Milkovich*, 15 Ohio St. 3d at 297, 473 N.E.2d at 1195-1196. The effect of such a conclusion raises substantial doubt amongst the Ohio press over who is a public official.

The conflict that now exists between the two decisions by the Supreme Courts of Oklahoma and Ohio should be resolved by this Court in favor of the Oklahoma decision. This *amicus curiae* firmly believes that *Johnston's* holding that a public school coach is a public official is much more in keeping with *Rosenblatt* than is *Milkovich's* decision that he is not. The ONA can think of few other positions than those of public school teachers and coaches which have "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." *Rosenblatt*, 383 U.S. 86. *See, Johnston, supra*.

While elaborating on its standard for determining public official status, this Court said the following:

> The [public] employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

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[1]The Ohio Supreme Court also appears to find that *Butts* was significantly undermined by *Gertz*. *See, Milkovich*, 15 Ohio St. 3d 295-297, 473 N.E.2d at 1193-1195. The ONA finds no such disapproval and believes that *Butts* would be decided similarly if reconsidered today. *See, Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979).

Rosenblatt, 383 U.S. at 87 n. 13. Public school teachers and coaches surely satisfy that standard, expecially so when they occupy the highly visible position of high school coach. Beyond that generality, however, this coach in particular—who sought out the notoriety he achieved—had invited "public scrutiny."

Finally, the Ohio court's finding that the article in question comprised "factual assertions as a matter of law" should be corrected. *Milkovich*, 15 Ohio St. 3d at 298, 473 N.E.2d at 1196-1197. This aspect of the case presents a particularly onerous burden on the Ohio press since the Ohio Supreme Court said it had "not adopted any specific standard" on this issue and it "decline[d] to establish a *per se* rule" here. *Id.*

Such ambiguity begs to be clarified, and the ONA urges this Court to hear and determine that issue. In its decision, the Ohio court declined to accept the rationale of the United States Court of Appeals for the Sixth Circuit in *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. den.* 440 U.S. 960 (1979). The *Orr* court held that "a statement of opinion about matters which are publicly known is not defamatory." *Id.* at 1114. In so holding, the court adopted the rule of the Restatement (Second) of Torts which reads as follows:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Restatement (Second) of Torts § 566 (1977). That rule, and several of its examples, are premised in part on decisions of this Court. *See, Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), and *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), and in this instance, not only did petitioners' article *not* imply undisclosed facts, it set them out as eye-witness testimony in part by the author and in part by quoted statements made to the author by the commissioner of the Ohio High School Athletic Association. *See*, Petitioners' Petition For A Writ Of Certiorari at A75-A77.) If such a complete dis-

closure of facts cannot satisfy the standards for opinion under Ohio Law, the press runs great risks with nearly every edition that goes to print.

CONCLUSION

Based upon all of the foregoing, this *amicus curiae* respectfully urges this Court to grant the petition for certiorari and to resolve these issues that cloud the operations of the Ohio press. As this Court has said, "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Gertz*, 418 U.S. at 345. That appears not to be the law in state court in Ohio now.

Respectfully submitted,

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